



Welcome to the September 2017 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: alcohol and best interests, the price for failing to support, patient choice from the other side of capacity, and Bournemouth brought to life;

(2) In the Property and Affairs Report: Denzil Lush and LPAs, the Law Commission consultation on wills, professional deputies run amok and OPG updates;

(2) In the Practice and Procedure Report: s.21A, medical treatment and the role of the courts, the extension of the pilots, and guidance on CoP visitors;

(3) In the Wider Context Report: mental capacity in (in)action in SARs, litigation friends in tribunals, legal services and vulnerability, and the Committee on the Rights of Persons scrutinises the UK;

(4) In the Scotland Report: a Scottish perspective on powers of attorney problems and attorney registration updates.

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#), and our one-pagers of key cases on the SCIE [website](#).

We also take this opportunity to say goodbye to our fellow editor Anna Bicarregui and thank for all her dedication in producing contributions against the odds – we will miss you.

Editors

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The picture at the top, "Colourful," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

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Denzil Lush and LPAs

On 15 August, the BBC interviewed Denzil Lush (former long standing Senior Judge at the Court of Protection) on the Today programme. The subject of the interview was Denzil Lush’s views concerning LPAs that he had expressed in the foreword to the new edition of Cretney and Lush on Lasting and Enduring Powers of Attorney. The BBC followed this up with an article on its website.

Denzil Lush pulled no punches, describing LPAs as risky and saying that he would not use one himself because of the lack of safeguards (as opposed to the close supervision provided to deputies).

The interview and article provoked much media and interested party comment. One such was that by Tor with contributions from Heledd Wyn and Barbara Rich published by the Transparency Project.

The OPG has not commented directly but in its blog on 23 August continued to press the virtues of LPAs

The main thrust of Denzil Lush’s criticism was in respect of property and affairs LPAs and the

ease with which they can be abused. Very different considerations arise in respect of welfare LPAs.

So far as the former are concerned, lay clients when they seek advice about what they fear may be financial abuse by an attorney are often surprised by the limited powers available to the OPG and the Court of Protection. In particular, they are often surprised to learn that the Court of Protection has no power to order a delinquent attorney to make good any losses to P’s estate.

Some tightening up in this area might be in order without impinging on the principle of autonomy or creating unnecessary expense. Perhaps a power for the OPG (without a court order) to require accounts backed up by a civil penalty for non-compliance coupled with powers given to the Court of Protection to make summary orders for restitution (to save the expense of the appointment of a deputy with power to bring recovery proceedings in the County Court or Chancery Division.

Finally, we should note that the position in Scotland is different – for an update on the view from the across the border, see the article by Adrian Ward in the Scotland section of this Report.

Law Commission Consultation on Wills

The Law Commission published on 13 July a major consultation on the potential for reforms to the law of wills in England and Wales. The detailed and comprehensive report can be found [here](#), along with a summary and some useful infographics, and the consultation period runs until **10 November**. The Law Commission particularly welcomes views from medical professionals on its plans on mental capacity and the general public on questions around their experiences of making a will.

The consultation document is lengthy, but we suggest that all those remotely concerned with wills look, at a minimum, at the admirably crisp summary. For present purposes, we highlight a number of specific aspects of particular and immediate interest from both a mental capacity and CRPD aspects.

Mental Capacity

As the Law Commission notes, the legal test of testamentary capacity currently used is from the nineteenth century decision in the case of *Banks v Goodfellow*. The Commission provisionally proposes (in Chapter 2) that testamentary capacity should instead be governed by the capacity test in the MCA 2005, and be accompanied by a specific code of practice for testamentary capacity. For our part, it seems to us that this an obviously necessary step for a host of reasons (not least to stop the need to keep explaining to doctors and lawyers that they look to one test for purposes of statutory wills and an entirely different test for purposes of making a will outside the scope of the CoP).

Statutory wills

The Law Commission discusses the position of statutory wills in Chapter 3 – including by reference to the requirements of the CRPD. The Commission provisionally concludes that substantive reform is not required (although this is, in part, in the context of the earlier suggestion in the Mental Capacity and Deprivation of Liberty report that the s.4 test should be amended to require particular weight to be given to the individual's wishes and feelings). The Commission may well welcome some assistance in formulating its final proposals in light of the absolutist position set out in Concluding Observations of the Committee on the Rights of Persons with Disabilities discussed in the Wider Context section of this Report.

The Commission also solicits views as to whether any steps could be taken to reduce the cost and length of statutory will proceedings. In any consultation response, you may well wish to take account of what Charles J said (just too late, we suspect, for the Report) about the way in which parties and the Court need to approach the statutory will process in *ADS v DSM* [2017] EW COP 8.

Supported will-making

Chapter 4 contains a detailed discussion of the arguments for and against the introduction of a scheme of supported will-making, in particular through the prism of the CRPD. The Commission also outlines in detail what a supported will-making scheme could look like – in parallel with the supported decision-making scheme proposed in the earlier Mental Capacity and Deprivation of Liberty project (indeed, the Commission concludes that the draft enabling

power in the Draft Bill appended to that project is wide enough to encompass a specific scheme for support with will-making). We would urge anyone interested in making concrete the Article 12 CRPD commitment to secure support for the exercise of legal capacity to respond specifically on this aspect.

Undue influence

The Law Commission sets out a provisional proposal in Chapter 7 for a statutory doctrine of testamentary undue influence. This is of particular interest and potentially no little use in fleshing out the meaning of “conflict of interest and undue influence” in the context of Article 12(3) CRPD (which requires the implementation of safeguards to ensure that measures relating to the exercise of legal capacity are “free of conflict of interest and undue influence.”

A sorry tale: professional deputyship run amok

Public Guardian v Matrix Deputies Limited and London Borough of Enfield [2017] EWCOP 14 (Senior Judge Hilder)

COP jurisdiction and powers – costs – deputies – financial and property and affairs

Summary

In this case the Public Guardian made applications in respect of the deputyships (some 44) of Matrix Deputies Limited (and 2 of its former employees). The Public Guardian sought revocation of the orders and refusal of appointments in pending cases.

The case concerned deputyships in the London Borough of Enfield that had arisen out of an out-

sourcing arrangement between the borough and Matrix. The allegations were serious. Broadly they were:

- a. Excessive fee charging: fees were charged to individuals in excess of what the deputyship appointment permitted and/or irrespective of work actually done by the deputy;
- b. Inappropriate/inadequate arrangements for holding/recording client funds and transactions: all clients' funds were held in a single account, with unexplained discrepancies between closing and opening balances, inconsistencies with reports submitted to the Public Guardian and no clear record of individual balances;
- c. Conflicts of interest arising from inappropriate relationships with other bodies: individuals held positions in both Matrix and another company, or were family members of key personnel in those other companies, whose services were engaged to provide services to individuals at considerable cost and without appropriate evidence of competitive tendering and best interests decision making;
- d. Failure to provide information requested/comply with orders for disclosure: the response to the February 2016 order for disclosure was insufficient for the completion of investigations such that a further application to court, and a second report, were required.

The 2 individuals agreed at relatively early stages to orders in respect of their deputyships but Matrix continued to contest the applications until, after 20 months litigation, it agreed that

their deputyships should be revoked and no further ones made.

Given that Matrix admitted some allegations that were serious in themselves, namely taking commissions from estate agents on the sale of 3 properties and they only gave full disclosure after the court had made an order permitting entry on their premises to obtain documents, the concession was probably inevitable.

That left the issue of costs. The borough sought its costs from Matrix on the indemnity basis, Matrix argued for no order.

The Judge set out the relevant law from *R (Boxall) v Waltham Forest LBC* (2001) 4 CCL Rep 258 QBD (Admin), where Scott Baker J confirmed that the court has power to make a costs order when the substantive proceedings have been resolved without a trial, but when the parties have not agreed about costs; specifically in relation to compromised cases...he observed that:

at each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties.

This principle had previously been applied to COP proceedings by Cobb J in *JS v KB & MP* [2014] EWCOP 483 at paragraph 13.

Senior Judge Hilder held that the admitted conduct and the failure to disclose, together with the fact that the application was wholly successful justified a departure from Rule 159 of the COP Rules (see paragraph 39). She ordered Matrix to pay the borough's costs.

Senior Judge Hilder then considered whether those costs (which amounted to £250,000) should be paid on the indemnity basis. At paragraph 42, she held the Matrix's conduct had been wholly out of the norm justifying an award of costs on the indemnity basis.

Comment

Costs orders against parties are unusual in the COP. Where, as here, a paid deputy defaults and then obstructs the court's process, clearly an order for costs is justified. Defaulting deputies should not believe that they can have a free ride in this respect.

OPG Annual Report 2016-2017

On 19 July 2017, the OPG published its [annual report](#), which provoked some considerable media coverage in light of revelation that it had for some period of time prior to the reduction in costs in April 2017 mistakenly been charging fees well above the costs incurred in processing applications without the requisite statutory authority to do so. The amount owed in consequence to registrants – which will be refunded during the current financial year – is estimated at £89 million.

The report contains some further interesting statistics in light of Denzil Lush's comments reported in this issue.

There were 648,318 applications to register either LPAs or EPAs (the latter numbering 12,778) with 2,478,758 instruments on the register. By contrast, the OPG is currently supervising only 57,702 deputyship orders.

That represented an increase in the number of registrations of 102,311 LPAs over the previous year. The number of deputyships had increased by only 1.02%.

The OPG received 5,327 safeguarding referrals in the year, a decrease of 15% (in part due to a change in counting method).

In the circumstances, it must be at least doubtful that the OPG and the Court of Protection could cope with a wholesale change from the use of LPAs to deputyships of the nature envisaged by Denzil Lush.

OPG's new Safeguarding Policy

On 4 July, the OPG published an [updated version](#) of its Safeguarding Policy

Of particular interest in relation to property and affairs is the section on spotting abuse in this area. This is at section 11 and mentions:

- A change in living conditions.
- Selling possessions.
- Being unable to pay bills, or an unexplained lack of money.
- Money being taken out of an account without a reason.
- Financial documents being lost without a reason.

- Someone being cut off from family, friends or their social network.
- The carer having more money to spend on things like clothes, travel or accommodation.
- Sudden changes to a bank account or how someone uses it.
- New, recent authorised signers on a client or donor's account card.
- Money being taken without permission from the adult at risk's ATM card.
- Changes in how the ATM card is being used (such as more frequently or from different locations)
- Sudden or unexpected changes to someone's will or other financial documents.

There are very useful sections on reporting concerns and also what the OPG cannot investigate.

Short Note: show your workings

In the clinical negligence case of *JR v Sheffield Teaching Hospitals NHS Foundation Trust* [2017] EWHC 1245 (QB), William Davis J had to decide on rival contentions as to deputyship costs. Each side called an expert experienced in deputyships. C's produced detailed workings as to what hours needed to be spent by what level of fee earner. D's put forward global annual figures based on his experience.

One issue was what would be required in the first year. Unsurprisingly perhaps, the judge preferred C's expert and allowed the £30,000 odd claimed

against the £12,000 D's expert had put forward.
(see paragraphs 104-109).

There is a clear lesson to be learned here.

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Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Wellcome Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click [here](#).



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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click [here](#).



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Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click [here](#).



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Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. To view full CV click [here](#).



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Conferences

Conferences at which editors/contributors are speaking

The Legal Profession: Back to Basics

Adrian is speaking at the [Annual Conference](#) of the Law Society of Scotland in Edinburgh on 19 September 2017.

JUSTICE Human Rights Law Conference

Tor is speaking at JUSTICE's [Annual Human Rights Law Conference](#) in London on 13 October.

Mediation Awareness Week

Tor is taking part in a [panel](#) on 16 October on "Mediating Medical cases after Charlie Gard" as part of Mediation Awareness week.

Adults with Incapacity: the Future is Now

Adrian is speaking at this half-day LSA conference on 18 October in Glasgow. For more details, and to book, see [here](#).

National Advocacy Conference

Alex is speaking at the [National Advocacy Conference](#) in Birmingham on 19 October. For more details, and to book tickets see [here](#).

National IMCA Conferences

Alex is speaking at the two Irwin Mitchell/Empowerment Matters National IMCA Conferences in [Sheffield](#) on 20 October and [London](#) on 10 November.

Deprivation of Liberty Safeguards: The Implications of the 2017 Law Commission Report

Alex is chairing this [conference](#) in London on 8 December.

Taking Stock

Neil is speaking at the annual AMHPA [conference](#) in Manchester on 19 October.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity [My Life Films](#) in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next Report will be out in October. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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